Supreme Court, U.S.
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NO. 90-1842

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

COMMONWEALTH OF PENNSYLVANIA, Petitioner

v.

MEREDITH PENN, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

ATHENA M. DOOLEY, ESQUIRE
Counsel for Respondent
721 E. Rittenhouse Street
Philadelphia, PA
19144-1247
(215) 848-9268

EDITOR'S NOTE:

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STATEMENT OF THE CASE

The Superior Court of Pennsylvania held that the trial court in this matter had violated respondent's sixth amendment right to an open public trial and prejudiced respondent by excluding spectators during a portion of his trial.

Respondent, Meredith Penn, surrendered himself to detectives at the Police Administration Building in Philadelphia, Pennsylvania, on August 6, 1984, charged with the shooting death of his common-law wife, Justine Davis, the mother of their two and one half year old son. The jury found the respondent guilty of murder in the first degree and possession of an instrument of crime on September 11, 1986. Post-trial motions were filed, which were denied on November 26, 1986. Sentencing was held on January 28, 1987, at which time he

was sentenced to life imprisonment and 2 1/2 to 5 years concurrent.

In February, 1987, respondent obtained new counsel to file Motion to reconsider and vacate denial of motion for new trial and to reconsider, modify and/or vacate sentence, which was denied by the trial judge without a hearing, and to file an appeal to the Pennsylvania Superior Court (hereinafter referred to as appellate court).

Upon the appellate court's ruling and decision on July 7, 1989, to remand for a new trial, the appellant sought panel reconsideration or en banc reargument of the appellate court's ruling. The appellate court denied the appellant's application for reconsideration on August 31, 1989. Appellant's Petition for allowance of appeal to the Pennsylvania Supreme court was denied on February 25, 1991.

At his trial, respondent testified that he purchased a gun in 1983, for protection, after having been assaulted (N.T. 9/10/86 pp. 177-180) and that he kept the gun in his car, when he traveled to and from his home, because he had been threatened by Gregory, a friend of his wife's, and some of Gregory's friends in July, 1984 (N.T. 9/10/86 pp. 182, 170-171). Respondent further testified that his wife deserted him and their son, while they slept, two weeks before the incident, and that on August 4, 1984, he had gone to talk with her about why she left and about her helping him care for their son, so he could continue working (N.T. 9/10/86 pp. 182-190, 202-207). Respondent testified that he and his wife were in his car and that he was trying to get Ms. Davis' hand off the gun and his hand, when the gun "went off" (N.T. 9/10/86 pp. 215)

suddenly and accidently.

Theodore Reed, a co-worker of respondent's at LaSalle University Security Department was called as appellant's witness. The appellant told the court that Mr. Reed was present to testify the morning of September 10, 1986, that he didn't want to testify, because he was respondent's friend, that he didn't like what he was doing, that he left, and that the appellant wanted a bench warrant to bring him back to testify (N.T. 9/10/86 pp. 71-74).

After the lunch break, Mr. Reed reappeared before the trial court, at which time the bench warrant was withdrawn, and the appellant told the trial court about the alleged threats against Mr. Reed and his family (N.T. 9/10/86 pp. 88-90). Mr. Reed did not testify or explain the circumstances himself or verify the appellant's

statements to the trial court. The trial court never examined Mr. Reed concerning the statements made by appellant concerning the alleged threats. The Court denied respondent's objection and motion for mistrial and cleared the court room (N.T. 9/10/86 pp. 93-96). There was no basis for the closure of the courtroom other than the unverified, unfounded, and vague, hearsay statements of the appellant. The trial court did not request that Mr. Reed attempt to identify those persons who allegedly threatened him, as defense counsel suggested (N.T. 9/10/86 pp. 92-93). The trial court admitted that respondent had the right to an open trial, pursuant to the sixth amendment, that the right is not absolute, that circumstances in which a witness was threatened may be a justification to limit 6th amendment rights, and that the

trial court could not determine whether there was an actual threat or by whom the threat was made (N.T. 9/10/86 pp. 91-95). Respondent raised this issue in post-trial motions and on appeal to the appellate court.

The appellate court, applying federal constitutional law, granted respondent a new trial. The opinion spoke at length on the need to respond effectively to witness intimidation, and held that clearing the courtroom of spectators may be appropriate under certain circumstances. However, the appellate court also held that the trial court had made "no findings" as to the "nature, extent, or impact" of the "alleged intimidation," and instead relied on "the prosecutor's second-hand, hearsay, rendition of the allegations" (Opinion, 11-12). The appellate court concluded that the burden placed on the

right to an open trial by clearing the courtroom for the testimony of one witness invariably required, "at a minimum" (emphasis in original) that the trial court hold an in camera hearing to determine if the threat "in fact exists" (Id. 12-13).

The appellate court set forth that the trial court had not made any findings or considered and/or assessed the circumstances surrounding the appellant's request for exclusion, as had been done by the court pursuant to prior opinions of the appellate court, the Pennsylvania Superior Court en banc, and the Pennsylvania Supreme Court, including, but not limited to, Douglas v. Wainwright, 739 F.2d 531, (11th Cir. 1984), cert denied, 469 U.S. 1208, 105 S.Ct. 1170 (1985), Waller v. Georgia, 467 US 39, 104 S.Ct. 2210 (1984), Commonwealth v. Contakos, 499 Pa 349,

453 A.2d 578 (1982), Commonwealth v. Wright, 255 Pa. Super. 512, 388 A2d 1084 (1978) (en banc), Commonwealth v. Knight, 469 Pa 57, 364 A.2d 902 (1976), Commonwealth v. Stevens, 237 Pa. Super. 457, 352 A2d 509 (1975) (en banc). The appellate court also set forth that the in camera hearing was one of the ways in which the findings could be made or circumstances surrounding the request for exclusion could be considered or assessed, and the cases that give authority for this.

Because the decision of the appellate court does not conflict with applicable decisions of the Court, the appellant's petition for writ of certiorari to the Superior court of Pennsylvania should be denied.

SUMMARY OF ARGUMENT

In the event of a closure of court proceedings, Waller v. Georgia sets forth certain criteria to be considered and applied by the trial court prior to the closure being permitted by the trial court. The right of the accused to an open and public trial is a constitutional right that is guaranteed, unless there is an overriding or higher conflicting interest that can only be protected by closure. These interests must be weighed against each other.

Holding an evidentiary hearing to weigh and consider these interests prior to closure has long been recommended by the courts as the better method to accomplish this and to convey the reasons justifying closure on the record.

In the event of a partial closure, courts have exercised a standard of whether there is a substantial reason for the partial closure rather than the overriding interest test.

Although the closure in the instant matter is a total closure, and although no showing of prejudice or harm is required, when a violation of the right to a public trial is asserted, the petitioner is requesting that this court apply the standard of substantial reason, rule that the witness was automatically entitled to testify in a closed courtroom, and in the event the closure is found to be in error, determine whether the error was harmless.

Since the trial court in the instant matter neglected to determine whether there was an overriding interest that necessitated total closure, to

limit the scope of said closure to be no broader than necessary, to consider reasonable alternatives to closure to make findings on the record adequate to support closure, and permitted total closure of respondent's jury trial during the testimony of a prosecution witness, the said closure was an error and violated the respondent's sixth amendment rights. The remand for new trial ordered by the appellate court should therefore be affirmed and permitted, and the petitioner's petition for a writ of certiorari must be denied.

REASONS FOR DENYING THE WRIT

THE SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL IS DENIED WHEN A COURT ROOM IS TOTALLY CLEARED OF SPECTATORS FOR THE TESTIMONY OF A WITNESS, PURSUANT TO WALLER V. GEORGIA, AND PREJUDICE IS IMPLIED, WHEN THIS CONSTITUTIONAL SAFEGUARD IS INHIBITED, DAMAGED, OR DESTROYED.

In Waller v. Georgia, a new trial was not ordered, because the defendant had been afforded an open public trial. Only the suppression hearing had been closed. The Court required a new suppression hearing, and held that if the material suppressed at the new suppression hearing was not suppressed at the prior closed suppression hearing, then the defendant would have a right to a new trial. The Court also held that the trial court should have considered alternatives to the closure and made findings adequate to support limiting the defendant's right to an open public hearing with the closure.

Waller sets forth tests which must be considered and met, when a closure is considered: a) the party seeking the closure must set forth an overriding interest that is likely to be prejudiced; b) the closure must be no broader than necessary to protect that interest; c) trial court must consider reasonable alternatives to closing the hearing; d) trial court must make findings adequate to support the closure. It was determined that the trial court in Waller did not consider alternatives to closure, that the reasons and interests proffered by the party seeking the closure were not specific enough to be considered an overriding interest, and that the trial court's findings were broad, general, and didn't purport to justify closure. Therefore, the closure was held to be unjustified and in error.

The petitioner proffers the theory that the decision in Waller limits the trial court's power to maintain order, protect witnesses, ensure a fair trial and to expedite litigation. That is simply not the issue in Waller nor is it the issue in the instant matter. The trial court certainly must maintain order in the courtroom and ensure a fair and public trial, all without violating the rights of the accused. In the instant matter, there was no specific or present or direct evidence of any intimidation or harassment, attempted or actual, within the courtroom, no evidence that any of the persons in the courtroom disrupted or attempted to disrupt the proceedings or obstructing justice in any way, and no evidence that there was disorder within the courtroom.

The cases of Illinois v. Allen, 397 U.S. 337 (1970) and Sheppard v. Maxwell,

384 U.S. 333 (1966), cited by petitioner, do not address the issue of closure of court proceedings. The closure in United States ex rel. Bruno v. Herold, 408 F.2d 125 (2nd Cir. 1969), cert. denied, 397 U.S. 957 (1970), was a partial closure, after the trial court actually observed behavior by certain spectators that appeared to intimidate the witness and thereby, to obstruct the proceedings. There was a partial closure during the first day of the trial and none during the second day. Under the circumstances, it was held that a sixth amendment situation was not reached.

The court has held that although the trial court has the power to exclude the public, when there is a demonstrated need to protect witnesses from threatened harassment or physical harm, that power should be sparingly exercised

and limited to circumstances where such an action is deemed necessary to ensure the administration of justice, and if the trial court excludes the public improperly, prejudice is implied and it is not required that a showing of harm from exclusion be made, United States v. Hernandez, 608 F.2d 741 (9th Cir. 1979), Davis v. United States, 247 F. 394 (8th Cir. 1917); Tanksley v. United States, 145 F2d 58 (9th Cir. 1944); United States v. Kobli, 172 F. 2d 919 (3rd Cir. 1949); United States v. Eisner, 533 F.2d 987 (6th Cir.), cert. denied, 429 U.S. 919 (1976); People v. Venters, 124 A.D. 2d 57, 511 N.Y.S. 2d 283 (1987), United States ex rel. Lloyd v. Vincent, 520 F.2d 1272 (2nd Cir. 1975), cert. denied, 423 U.S. 937., 96 S. Ct. 296, 46 LEd 2d 269 (1975). In Hernandez, and in Eisner, the court stated that the better course would have been for the trial

court to hold an evidentiary hearing rather than merely accepting the affidavit of one prosecution about another prosecution witness (in Hernandez) or basing its ruling on its belief that the witness was afraid, although it was unable to say whether the fear was real or imagined (in Eisner).

The court has set forth that the trial record must establish a real danger to the witness or a reasonableness of the witness' fears or a demonstration of the witness' inability to testify publicly, and that the witness is not arbitrarily and/or automatically entitled to testify with the public excluded, U.S. ex rel. Smallwood v. LaValle, 377 F. Supp. 1148 (E.D.N.Y.) aff'd, 508 F.2d 837 (2nd Cir. 1974) cert. denied, 421 U.S. 920 (1975). Although exclusions in emergency

situations, or when the proceedings are being influenced or impeded, are permitted, a sweeping and unlimited order clearing the court raises the issue of denial of sixth amendment rights, People v. Venters, 124 A.D. 2d 57, 511 N.Y.S.2d 283 (1987), State v. Callahan, 100 Minn. 63, 110 N.W. 342 (1907), Kobli, Davis. The court in Davis found it was a violation of the sixth amendment to exclude all persons except relatives of the defendant, members of the bar, and the media. The court in Venters found it was a violation of the sixth amendment to lock the courtroom doors during the charge to the jury. Intoxication of witnesses (in Davis) and possible distraction of jurors (in Venters) were not adequate reasons for closure.

The court in Eisner applied a standard of abuse of discretion to

determine whether the record was sufficient to support the trial court's finding that the witness was afraid and that grounds existed to exclude the public. The court balanced the interests of protection of the identities and lives of the undercover agents and informants against those of the defendants in Vincent and U.S. ex rel. Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977), and found that those interests were sufficient to warrant closure.

Waller was the basis for the decision in Venters. In State v. Klem, 438 N.W. 2d 798 (N.D. 1989), the court used the Waller test of overriding interests that can and need to be protected by closure and found that mere assertions of counsel were an insufficient basis for justification of closure. Both Venters and Klem concern

full closures as does Waller. When less than a full closure of the proceedings was involved, a different standard than that used in Waller was applied in Nieto v. Sullivan, 879 F.2d 743 (10th Cir. 1989). An evidentiary hearing was held to determine whether there was a substantial reason for a partial closure of the proceedings due to the witness' fear of testifying before the defendant's relatives. The court determined that since the closure was limited to the defendant's relatives, then the closure was partial and that the witness' fear was a substantial reason for a partial closure.

The Waller criteria was applied to the exclusion of disinterested parties from the testimony of juvenile witnesses during a rape trial in United States ex rel. Morgan v. Lane, 705 F. Supp. 410 (N.D. Ill. 1989). The Waller criteria

was distinguished in United States v. Sherlock, 865 F.2d 1069 (9th Cir. 1989). It was found that Sherlock concerned exclusion of only defendant's family and that this was not a true closure. The court weighed the defendant's rights against whether there was a substantial reason for closure and considered whether the closure was narrowly limited in scope to exclude the public only to the extent necessary to satisfy the purpose for which it was ordered. The spectators that were excluded were observed making faces and laughing at the witness during the witness' testimony. Even under those circumstances the court felt that the closure should have been the last alternative and "that the better course would have been for the judge first to issue appropriate admonitions as to improper courtroom behavior and then to

exclude spectators who failed to observe his request after holding an evidentiary hearing," Sherlock at 1078.

The closure in State v. Robillard, 146 Vt. 623, 508 A2d 709 (1986) was deemed to be partial, since the public has access to the courtroom during the recesses, but it was still maintained that the trial court must consider other reasonable alternatives to closure and place findings of fact on the record. In People v. Harris, 60 A.D. 2d 636, 400 N.Y.S. 2d 184 (1977), cert. denied, 439 U.S. 846 (1978), the closure was also deemed partial, since only two spectators were excluded. A conference was held in chambers, but the grounds supporting exclusion were not placed on the record, so the exclusion was an error.

In Douglas v. Wainwright, the Court held that a court must hold a hearing

and articulate specific findings before ordering either a total or partial closure, in addition to determining "substantial reason" for partial closing.

The closure in Douglas v. Wainwright was not a total closure as in Waller. The media, family members of defendant, witnesses and the decedent were all permitted to remain in the courtroom, as well as parties, lawyers, and court personnel. The court relied upon Aaron v. Capps, 507 F.2d 685 (5th Cir. 1975) and applied the standard of whether there was a substantial reason for the closure and whether those reasons were weighed against the defendant's rights. A hearing and adequate findings concerning the issues and circumstances surrounding the closure was deemed necessary by the Douglas panel, as in Waller. The

instant matter concerns a total closure of the proceedings, and therefore, concerns the right to a public trial guaranteed by the sixth amendment. In view of this, the criteria of Waller should have been followed and/or applied.

No showing of prejudice to the accused is required, when a violation of the accused's right to a public trial is asserted, Commonwealth v. Knight.

When exclusion is permitted, the court has held that prejudice is implied, Sielaff, and that exclusion is equal to denying the defendant's presumption of innocence, Tanksley, because it would be difficult to show any definite personal injury as a result of the closure and would necessarily damage or negate the guarantee of the safeguard, Hernandez. A reviewing court should not be permitted to consider

whether there was harmless error, especially in circumstances in which there was a total exclusion of the public, as in Waller and in the instant matter. Although the courts in Robillard and Hargrove determined that the defendants in those cases were not prejudiced by the exclusions, the exclusions were not total exclusions and such a determination was improper.

The trial court in the instant matter did not make any findings and was admittedly not clear as to the basis for the closure order. The appellate court in the instant matter noted that alternatives to closure should have been considered (Opinion pp. 13-14) and that closure should have been the "last option considered or employed," supra.

The appellate court specifically states in its opinion that this was a narrow decision held in the instant case

and that the findings required to justify a closure of the court were not made. The appellate court was merely setting forth the minimum requirements for due process and a constitutional, fair, open, public trial, and requiring the basic preservation of the respondent's rights. An in camera hearing was a suggestion of a step to be taken to determine the necessity or justification for closure as opposed to the sixth amendment rights of the respondent.

The appellate court in the instant matter, applied the same legal standards that were applied in Waller v. Georgia, Douglas v. Wainwright, Commonwealth v. Knight.

The appellant has stated throughout these proceedings that there was no factual dispute about the threats against Mr. Reed. There are no facts at

all, only the appellant's version of Mr. Reed's statements. No one knows if any portion of that version contained misstatements. No one knows if Mr. Reed knew who threatened him or not. There was no confirmation from Mr. Reed, himself, that he had been threatened and that because of these threats, he was afraid to testify. There was no evidence that Mr. Reed had been threatened within the courtroom. The trial court never asked Mr. Reed to confirm what the appellant stated.

It is not disputed that the trial court has the power to counter disruptive or threatening behavior in the courtroom. However, when a partial or total , especially total, closure of the public is requested, the sixth amendment rights of the other party are in danger of being prejudiced or inhibited or damaged or voided.

If the trial court has the power to clear the court room, it certainly has the power to hold an in camera hearing to inquire into facts or circumstances. The trial court should certainly have given as much weight to the clearing of the courtroom and denying or limiting the defendant's sixth amendment rights as it gave to unsubstantiated claims of intimidation. It would follow that if there are claims of intimidation, the trial court has the power to determine the true circumstances of those claims and whether those circumstances justify closure of the trial.

Since the trial court in the instant matter neglected to determine whether there was an overriding interest that necessitated total closure, to limit the scope of said closure to be no broader than necessary, to consider reasonable alternatives to closure to

make findings on the record adequate to support closure, and permitted total closure of respondent's jury trial during the testimony of a prosecution witness, the said closure was an error and violated the respondent's sixth amendment rights. The remand for new trial ordered by the appellate court should therefore be affirmed and permitted, and the petitioner's petition for a writ of certiorari must be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petitioner's petition for a writ of certiorari to review the decision of the appellate court be denied.

Respectfully submitted,

ATHENA M. DOOLEY, ESQUIRE
Attorney for Respondent

721 E. Rittenhouse Street
Philadelphia, PA 19144-1247
(215) 848-9268